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# The Changing Face of Procurement Policy An innovative approach to competing requirements

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# The Changing Face of Procurement Policy

*An innovative approach to competing requirements*

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## *Variation of an Old Game*

- Navigating the 'minefield' of procurement policy to obtain the goods and services of the customer
- 1990's – Military shifts focus from support to customer based
- Moving to a different environment can create 'culture shock'
  - You don't know what you think you know
- My days in England
  - Language
  - Sports
- Entering Government contracting from the business world





# New Type of Government

## ■ Origins

- Monarchies and dictatorships
- Abuse of power over the people

## ■ New Government

- Focus on limited power
- Fair interaction with the people
- Checks and Balances

## ■ Constitution

- Law of the Land
- Structured Government to split its power among three branches
- Bill of Rights
  - Rights of the people in relations with the Government





# Branches of Government

- Each branch has specific powers
  - Ensures one branch does not obtain imbalance of power
  - “Any powers not explicitly given to the Federal Government by the Constitution remain the power of the individual states”
- Legislative Branch
  - Passing all Federal Laws
  - Appropriating funds for any government spending
- Executive Branch
  - Sign legislation into law
  - Commander and Chief of the Armed Forces
  - Manage the operation of government functions
- Judicial Branch
  - Interpreting laws (how do they apply to a specific situation)
  - Judgment/resolution when law is violated
  - Set precedence for future action





# Government vs. Private Contracting

## ■ Contract

- Agreement between parties that can be enforced by a government body
- Elements
  - Between two or more legal entities, individuals or businesses
  - Competent Parties (Parties able to legally enter into a contract)
  - Consideration (exchange of value)
    - Equitable exchange
  - Substance of contract must be legal (no illegal activity involved)
- If one party creates a 'Breach of Contract', the other party can be awarded damages from a governing body







# Government vs. Private Contracting

## ■ Private Contracting

- Can choose another company to contract with for any reason
- Salesmanship/ Wine & Dine the client is allowed
- Any change must be bilateral
- Cannot break a contract without bilateral consent (subject to breach of contract)
- Both parties can decide the terms of the contract and have the other party sign to show consent

## ■ Government Contracting

- All offerors must have a fair and equal chance of winning the contract
- Government Official cannot benefit from his/her position (cannot accept gifts)
- Certain unilateral changes on the Government's part allowed
- Government can end a contract for its convenience
- Certain terms and conditions must be in a government contract





# Sources of Acquisition Rules

## ■ Executive Branch

- Policies and Orders
- Office of the President directs agencies
  - OMB, OFPP, Presidents approach to management
- Change in Presidents
  - Political environment
  - Degree of difference in belief between incoming and outgoing Presidents
- Agencies
  - Mission
  - Need for specific products (industry standards)
  - FAR Supplements, IL, directives, handbooks
  - Dual Reporting







# Sources of Acquisition Rules

## ■ Legislative Branch

- Passes Laws
  - Often enacts laws that affect its interaction with the people quicker than between private companies/people
- Number of laws address fairness in the process
- Control of money for acquisition
  - Constitution – “No money will be spent by the Government that is not appropriated by Congress”
  - Federal Budget process
    - Determine how much money each agency receives
    - Earmarks
- Legislation influenced by outside factors
  - Current events in society
  - Political influence of Special Interests
  - The ‘TV affect’





# Sources of Acquisition Rules

- Affect on current laws often not addressed
- Vague language to allow application to various conditions
- Judicial Branch
  - Common Law
    - Practices and court rulings
    - Precedence for future cases
  - Decision closely followed due to affect on policy and practices
    - Types of Decisions
      - Law ruled unconstitutional
      - Claim of unfair treatment of a vendor during the procurement process





# Protests and Disputes

- Each branch addresses disputes
- Executive Branch Agencies
  - Protest to the CO(KO in DoD) or one level above
  - Decision
    - Valid Protest – Agency can overturn CO or CO can decided to re-solicit.
    - Dismiss Protest
  - Civilian Board of Contract Appeals (CBCA)/(ASBCA)
    - Current court structure for government contracting claims
    - Established by section 847 of National Defense Authorization Act for 2006
    - Continuation of the authority to hear disputes between individuals and executive agencies
      - Contract Disputes Act of 1978





# Protests and Disputes

## ■ Legislative Branch

- Government Accountability Office (GAO)
  - Nonpartisan group that reports to Congress
  - Recommends an action to the agency
  - Agency is not bound to follow recommendations
    - Congress does follow-up with why the agency did not follow recommendations

## ■ Judicial Branch

- Hears complaints through the court system
- Rules on claims in favor of the company or the Government
  - Normally with damages if the company wins
  - Issues a legal opinion with decision
- Court of Federal Claims
  - Place a suit for damages
- Legal Opinions are watched by agencies as an indicator of how the court will rule on future cases
  - Procedures often adjusted based on outcomes





# History of Procurement Policy

- Government purchase of goods and services go back to founding of this country
- Government = largest buyer of goods and services in a market.
  - Potential for abuse of power
- Purpose of procurement laws
  - Protect people doing business with the Government
  - Receive best value for taxpayers
- Policies throughout history
  - Pre-WWI
  - Post WWI
  - Current





# History of Procurement Policy

## ■ Pre-WWI

- Most needs were defense related
- Advertising and Sealed Bids (1842)
- Antifraud Act (1862)

## ■ Post WWI (mostly before and after WWII)

- Economy Act (1921)
- Davis-Bacon Act (1931)
- Armed Services Act (1947)

## ■ Recent History (Modern Contracting)

- Commission on Government Procurement (1970)
  - A study on how Government procures goods and services.
  - Took back much of the CO discretion granted under the War Powers Act
- Competition in Contracting Act (CICA) (1984)
  - Requires open competition and Fair Treatment of Contractors
  - Concept of a 'level playing field'







# History of Procurement Policy

- Recent History (Modern Contracting)
  - FAR developed
    - Set policy for all parties participating in federal procurement
  - Packard Commission (1996)
    - Starts a shift toward leveraging 'commercial' best practices
  - Addressing issues business have in doing business with Government
    - Federal Acquisition Streamlining Act (1994)
      - Remove some bureaucracy when procuring commercial items
- Most Recent
  - Service Acquisition Reform Act Final Report (2007)
  - American Recovery and Reinvestment Act (2009)
    - Transparency and reporting





# Contracting Environment

## Oversight and Guidance

### Executive Branch

President  
Executive Orders

OMB

A-11  
A-76

OFPP

Policies

DoD

Guidebooks

Directives

5000 Series

Source Selection Guidance

Defense Acquisition Deskbook

ASPA (1947)

ASPR

DAR (1978)

FPASA (1949)

FPR

FAR (1984)

DFARS

Service Supplements  
to FAR/DFARS

Buying Activity  
Supplements

FASA (1994)

FARA (1995)

Clinger-Cohen (1996)

SARA (2003)

AIAA (2007)

Army

Navy

Air Force

### Congress

Laws

GAO

Audits

Protests

Decisions

Stay Provisions

Courts

Claims

Protests

ASBCA

Claims





# Conflicts in Guidance

## ■ Different Forces/Responsibilities

- Economies of Scale vs. Socioeconomic goals
  - Small Business Act vs. Competition in Contracting Act
  - Government responsibility to improve socioeconomic groups
  - Fiduciary responsibility to spend the taxpayer's money wisely
- CICA vs. 'Green' businesses
  - Rarity of green technology might = sole sources
- Socioeconomic programs vs. Value Added
  - 'Pass through' organizations
- Changing order of priority of socioeconomic groups
  - Competition of groups in special interest groups





# Conflicts in Guidance

- Fixed Price vs. Cost-based
  - Shifting risks
  - Accurate Estimate
    - Commercial and non-commercial after enough production runs
  - Varied Estimates
    - Construction
    - Services
      - Different site conditions
      - Changes in Wage determinations
- Contract Administration
  - Success hinges on administration (especially service contracts)
  - Focus is on PALT
- Source Selection
  - Continuity of Service vs. Quality of Service
    - Executive order to give first hire option to incumbent's employees
    - Quality problem with contractors' employees





# Approaches

## ■ Current

- FAR Council (currently happening)
  - Proposed rules open to comment
  - Changes can be made to different parts at different times
    - Different authors
  - Legislation trumps policy
- Use of Thresholds
- Opening to broader competition – left to agency

## ■ Legislative

- Open laws to comment prior to vote on final law (similar to FAR process)

## ■ Focus on training and accountability at CO level

- Allow more judgment calls at the CO level
- Clear Chain of Command





## Approaches – Contacting Office Level

### ■ FAR Guiding Principles

- If not addressed in the FAR, but in the best interest of the government and not prohibited by law, Executive order or other regulation – it is allowed

### ■ Recurring needs

- Option Years
  - Useful in long term requirements with little price change
  - Not as useful in areas where pricing drops rapidly (i.e. Technology)
- IDIQ
  - Streamline – one full competition for multiple future requirements
  - Works better with commercial items than construction, services and large quantities for small businesses
    - Customized services can affect pricing
- MATOC
  - Currently used with construction
  - Can easily be adapted to services
  - Uses a 'Seed' project or fictional task order for evaluation







## Approaches – Contacting Office Level

- Performance Based
  - Private industry best practice
  - Focus on result
    - Get what you ask for
- Cradle to Grave (C2G) vs. ACO
  - Administration critical in services
  - C2G problems
    - Focus on PALT time, admin suffers
    - Original CO no longer with organization
  - ACO problems
    - ACO did not write the contract
    - Often a different location
  - Adapted ACO model
    - An ACO in contracting shop at the base level
    - Works only on contracts out of that shop
      - Can conference with COs who awarded





## Approaches – Contacting Office Level

- Economies of Scale (strategic sourcing) vs. Small business
  - Better pricing due to large volume
  - Bundling eliminates most small businesses
  - Alternatives
    - Encourage teaming – multiple companies band together as joint ventures
    - Agencies set up regional Multiple Award IDIQs (mini-schedules)
    - Communicate availability of GWACs for these purposes
- Quality Services
  - ‘first hire’ choice to incumbent employees vs. poor performance
    - Minimize disruption of services
  - Report poor performance, instead of ‘giving a pass’ just to finish the project
  - PPIRS
    - Expand reporting level to individuals
    - If government reported on individual performance, contractor relieved of need for ‘first hire’





## Conclusion

- Operating in complex environment
- Juggling requirements is an art form
- Innovative ideas are encouraged
- Risk management not risk adverse





Questions?????

